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No. 92-1700

In The

Supreme Court of the United States

October Term, 1992

GERTRUDE BAUMGART, et al.,

Petitioners,

v.

FAIRCHILD AIRCRAFT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court will grant certiorari to consider Petitioners' contention that orders of the district court in this case, affirmed by the Fifth Circuit, have produced a "federal-state conflict," when this Court has no jurisdiction over the district court's order which denied Petitioners' motion to abstain or remand, and when the only challenge to the decisions below which Petitioners have preserved – their position that the district court's order dismissing Petitioners' wrongful death claims on grounds of *forum non conveniens* (even though not disputed by Petitioners on the facts) was prohibited by 28 U.S.C. § 157(b)(5) – was correctly rejected on the merits by the courts below, and, in any event, has no relevance to "federal-state" relations.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Fairchild Aircraft Corporation, Respondent,[1] respectfully requests that this Court deny the petition for writ of certiorari of Petitioners.

OPINIONS BELOW

The opinion of the court of appeals and the district court's order of dismissal are set forth in the appendix to the petition for writ of certiorari. For completeness,

[1] Respondent has no parent company and no nonwholly owned subsidiaries.

Respondent has included, as an appendix to this brief, the unreported opinion of the bankruptcy court recommending that the motion to abstain or remand be denied (Resp. App. 1a),[2] the district court's order adopting the bankruptcy report and recommendation and denying the motion to abstain or remand (Resp. App. 40a), the judgment of the district court (Resp. App. 53a), and Petitioners' notice of appeal (Resp. App. 54a).

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1) for determining whether 28 U.S.C. § 157(b)(5) precluded the district court from dismissing this case on grounds of *forum non conveniens*. However, as set out at pp. 15 to 17 hereof, the remainder of the question presented for review by Petitioners (concerning the correctness of the district court's order overruling Petitioners' motion for abstention or remand to state court) is not within this Court's jurisdiction for two independent reasons. First, the district court's order declining to abstain or remand, was not appealed from by Petitioners. Second, a district court's order denying (or granting) abstention or remand is, in any event, not appealable. *See* 28 U.S.C. § 1334(c)(2); 28 U.S.C. § 1452(b).

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[2] Reference herein to "Resp. App. ___a" are to pages in the appendix of this brief. References to "Pet. App. ___a" are to pages in the appendix of Petitioners' petition.

PROVISIONS OF LAW INVOLVED

28 U.S.C. § 1334

Bankruptcy cases and proceedings

(c)(2) . . . Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. . . .

28 U.S.C. § 1452

Removal of claims related to bankruptcy cases

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

Texas Civil Practice and Remedies Code § 71.051

(Effective September 1, 1993)

FORUM NON CONVENIENS

(a) With respect to a claimant who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice an action to which this section applies would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the action in whole or in part on any conditions that may be just.

STATEMENT OF THE CASE

On February 8, 1988, a Fairchild metroliner III aircraft, owned and operated by a German airline, Nurenburger Flugdienst ("NFD"), crashed near Kettwig, West Germany, when the aircraft was struck by lightning during a thunderstorm. The two pilots and all nineteen passengers died in the crash.

On January 10, 1990, Petitioners, who are surviving relatives of the passengers and citizens of Germany, filed 19 separate lawsuits against Fairchild in 16 different state district courts (and before 16 different judges) of Bexar County, Texas. All such lawsuits were filed by the same law firm.

On February 1, 1990, Fairchild filed a voluntary Chapter 11 bankruptcy petition, for reasons which – as held by the bankruptcy court, the district court, and the Fifth Circuit – had nothing to do with this litigation.[3] (Resp. App. 12a; Pet. App. 3a). On February 8, 1990, Fairchild answered each of the 19 separate state court suits, denying all of Petitioners' allegations and further pleading that the suits should be dismissed under the doctrine of *forum non conveniens*.

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[3] The bankruptcy judge explained that infighting among Fairchild's competing shareholder groups led to severe lapses in management, followed by layoffs, and eventual pressure from the company's principal lender, Sanwa Business Credit. The bankruptcy was filed in consultation with Sanwa, with an understanding that the debtor would immediately seek the appointment of a Chapter 11 Trustee to take over Fairchild's affairs. (Resp. App. 12a).

On April 20, 1990, Fairchild properly removed the 19 state court suits to the United States Bankruptcy Court for the Western District of Texas. On May 3, 1990, Petitioners filed their motion to abstain or remand, to which Fairchild responded on May 15, 1990. After conducting a hearing and receiving evidence on the motion, the bankruptcy judge, in a thorough 27 page opinion, fully considered, analyzed, and rejected all of Petitioners' arguments advanced here and issued a "Report and Recommendation on Motion to Abstain or Remand," dated June 18, 1990, recommending to the district judge that Petitioners' motion to abstain or remand be denied. (Resp. App. 1a to 39a).

Thereafter, by order of July 30, 1990, the district judge, conducting a *de novo* review of Petitioners' objections, adopted the Report and Recommendation and denied Petitioners' motion to abstain or remand. (Resp. App. 40a-52a). In the same order, Fairchild's motion to withdraw the reference of the 19 cases from the bankruptcy court to the district court was granted. (Resp. App. 51a). The bankruptcy court confirmed the Trustee's Amended Plan of Reorganization on September 17, 1990. On September 21, 1990, the 19 separate suits were consolidated in the district court. On November 28, 1990, an order was entered vacating the automatic stay.

On December 5, 1990, Respondent timely moved for dismissal on grounds of *forum non conveniens*. The motion was supported with affidavits and other evidence. Petitioners filed a response and offered evidence. Respondent replied and submitted additional affidavits.

On September 30, 1991, the Honorable Edward C. Prado[4] granted Respondent's motion, dismissed the case, and ordered Petitioners to file suit in Germany within 120 days.[5] The district court carefully conditioned its dismissal by imposing six requirements upon Respondent, including requirements that Respondent satisfy any judgments rendered by the German courts to the extent allowed by the bankruptcy plan and that Respondent submit to the district court's jurisdiction if any judgments were not satisfied (Pet. App. 34a).

On January 22, 1993, the Fifth Circuit affirmed the district court and held that 28 U.S.C. § 157(b)(5) did not preclude *forum non conveniens* dismissal. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5th Cir. 1993); (Pet. App. 1a). The court of appeals also affirmed the district court's holding that Germany, and not Texas, was the most convenient forum, *id.* at 837 (Pet. App. 21a), and held that, accordingly, Petitioners' arguments as to abstention and remand had been "rendered moot". *Id.* at 834-35; (Pet. App. 16a).

Petitioners filed their petition for writ of certiorari on or about April 22, 1993, which Respondent received on April 23, 1993.

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[4] Judge Prado was assigned to this case after the previous district judge, Emilio M. Garza, was appointed to the Fifth Circuit.

[5] Respondent agreed to and the district court approved Petitioners' request to stay this 120 day time limit, first pending the outcome of the appeal to the Fifth Circuit and, now, pending this Court's determination.

REASONS FOR DENYING THE PETITION

1. SUMMARY

Petitioners seek certiorari to resolve "a conflict among the circuits" and a "federal-state conflict" alleged to have resulted from the decisions below of the bankruptcy court, the district court, and the Fifth Circuit. There are no such conflicts in this case, nor does the case present any special or important reasons that would justify the granting of certiorari.

Clearly, there is no "conflict among the circuits" concerning whether 28 U.S.C. § 157(b)(5) statutorily abolishes *forum non conveniens* in bankruptcy-related wrongful death actions, for as the Fifth Circuit correctly observed, "The question appears to be one of first impression." *Baumgart*, 981 F.2d at 829; (Pet. App. 5a).[6] The cases relied upon by Petitioners for the claim of a circuit conflict do not concern (and do not even mention) a *forum non conveniens* dismissal at all. Moreover, the Fifth Circuit's comprehensive opinion fully considered and correctly rejected Petitioners' contention that 28 U.S.C. § 157(b)(5) precluded *forum non conveniens* dismissal. Further review by this Court is simply unnecessary.

Nor have the decisions of the courts below resulted in any "federal-state conflict." There is no federal-state conflict when a federal court, as here, correctly follows and applies federal law in dismissing a case, upon which

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[6] Petitioners agreed so in the court of appeals, and in their request for oral argument said that "The issue before this Court is one of first impression." (Appellants' brief in the court of appeals p. iii).

federal question jurisdiction admittedly exists, on ground of *forum non conveniens*.

Likewise, the decision below in no way offends principles of federalism and comity. To begin with, to the extent that Petitioners complain about the district court's refusal to abstain or remand, such claim is not within the Court's jurisdiction. In any event, such order, far from being a "clear abuse of discretion," was correct – all the relevant factors were carefully and correctly analyzed in the opinions of the bankruptcy court and the district court.

Contrary to Petitioners' contention that the decisions below failed to consider Texas state interests (petition at p.11), the bankruptcy and district courts in fact did so (Pet. App. 29a, 33a; Resp. App. 23a-24a), and correctly held that the *Younger* doctrine has no application here because there are no compelling state interests implicated by resolving a claim against a bankruptcy estate within the federal system. (Resp. App. 16a). Indeed, remand would have been erroneous because no pending state proceedings remained after the 19 cases were properly removed to federal court.

Finally, the holdings of the district court and Fifth Circuit that, on balance, Germany, and not Texas, was the most convenient forum to try these cases (which ruling, on the merits, Petitioners do not contest in this Court) are not an intrusion into state court practice. Rather, they are a straightforward application of this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

2. THE FIFTH CIRCUIT'S HOLDING THAT 28 U.S.C. § 157(b)(5) DID NOT PROHIBIT FORUM NON CONVENIENS DISMISSAL WAS CORRECT.

The Fifth Circuit's unanimous holdings that 28 U.S.C. § 157(b)(5) does not abrogate the doctrine of federal *forum non conveniens* in wrongful death suits and that the district court was not precluded by such statute from dismissing this case on *forum non conveniens* were entirely correct. To begin with, federal courts have inherent discretionary power through the doctrine of federal *forum non conveniens* to decline to exercise jurisdiction when, as here, an adequate and available foreign forum is more convenient. *Baumgart*, 981 F.2d at 828; (Pet. App. 4a). The district court found that an available and adequate forum existed in Germany. As the Fifth Circuit held, Petitioners "have not challenged these findings, and we find no abuse of discretion in the trial court's holding." *Id.* at 835; (Pet. App. 18a). In fact, Petitioners do not contend, in this Court, that "there has been a clear abuse of discretion" by the district court, *Piper Aircraft Co. v. Reyno*, 454 U.S. at 257, in dismissing this case in favor of Germany. Rather, the issue, and only issue, is whether Congress, in adopting 28 U.S.C. § 157(b)(5) to remedy an expansive grant of jurisdiction to bankruptcy courts, abolished (but neglected to say so in the statute) federal *forum non conveniens* in the district courts in bankruptcy wrongful death actions.

Section 157(b)(5) is part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, enacted in response to *Northern Pipeline Construction Co. v. Marathon*

Pipe Line Co., 458 U.S. 50, 62 (1982).[7] The obvious purpose of § 157(b)(5) was to place wrongful death cases in the district court, before an Article III judge as opposed to the bankruptcy court, thus remedying the constitutional infirmity in *Marathon*. As the Fifth Circuit correctly reasoned:

> Read in the context of Section 157, where it appears, and in the context of the history giving rise to the Act and its remedial purpose, the language of § 157(b)(5) delineates jurisdiction only as between the bankruptcy courts and the district courts. In other words, non-core proceedings such as personal injury tort and wrongful death claims shall not be adjudicated in bankruptcy court, but in the Article III district court. Moreover, the district court in which the bankruptcy is pending shall have *added* power to order tried in its own venue personal injury tort and wrongful death claims filed elsewhere, or to order such cases tried in the districts where the claims arose. Once a personal injury tort or wrongful death claim is lodged in the district court where the bankruptcy is pending, however, neither the Act itself nor the legislative history of the Act evidences any intent on the part of Congress to abrogate the long-standing doctrine of *forum non conveniens* in the context of

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[7] As the bankruptcy court below correctly observed, this case, removed from state court by defendant/debtor, "is precisely the opposite of *Marathon* (where the debtor, as *plaintiff* tried to hale a third party into bankruptcy court). There is no question about the jurisdiction of this court over this case, because it involves, at bottom, nothing more than determination of the amount of the claim the plaintiffs will be entitled to assert against property of the estate." (Resp. App. 31a) (emphasis in original).

> foreign transfers. Indeed, there is no reference to the doctrine of *forum non conveniens* anywhere in the statute's legislative history.

Baumgart, 981 F.2d at 833; (Pet. App. 13a) (emphasis in original).

The Fifth Circuit's full consideration of each of Petitioners' arguments was entirely correct and need not be repeated here. Accordingly, Respondent incorporates the Fifth Circuit's opinion by reference. We would add, in particular, that Petitioners' repeated assertions that Respondent was barred from moving to dismiss on federal *forum non conveniens* after removal from state court was correctly rejected by the Fifth Circuit. As the Fifth Circuit noted, this Court, in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, upheld a district court's dismissal under *forum non conveniens* "even where the case had previously been removed to federal court and transferred to a different federal forum under § 1404(a)." *Baumgart*, 981 F.2d at 835; (Pet. App. 16a-17a).

3. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Contrary to the assertion at p. 5 of the petition for certiorari, the decision below does not conflict with decisions of the Second, Fourth and Sixth Circuits. As noted earlier (p. 7 hereof), the Fifth Circuit is the only court to have been presented with and to have decided the issue raised by Petitioners.

The decision by the Second Circuit in *In re Pan American Corp.*, 950 F.2d 839 (2d Cir. 1991) did not concern whether § 157(b)(5) abolished *forum non conveniens* in

bankruptcy related wrongful death actions. Rather, *In re Pan American* concerned a motion pursuant to 28 U.S.C. § 157(b)(5) to transfer Florida state wrongful death actions to the district court where Pan Am's bankruptcy was pending.

The Fourth Circuit's decision in *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986) is correctly analyzed by the Fifth Circuit in its opinion. *Baumgart*, 981 F.2d at 832 (Pet. App. 10a-11a). As held by the Fifth Circuit, the *Piccinin* "court never had before it a question of whether enactment of § 157(b)(5) served *sub silentio* to rescind the doctrine of *forum non conveniens*." *Id.*[8]

The Fifth Circuit also discussed the Sixth Circuit's decision in *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985), which, again, did not even mention whether § 157(b)(5) abolished *forum non conveniens*. The issue in *In re White Motor Credit* was the propriety of the district court's order that 160 separate, unliquidated and contingent products liability cases against the debtor would be left for trial in the courts where the actions were pending. The Sixth Circuit held that the district court had such authority to leave the tort cases pending in the various courts. *White Motor Credit*, 761 F.2d at 273. According to the Fifth Circuit, "Thus, in *White Motor Credit* § 157(b)(5) once again was construed to *enlarge* the district court's

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[8] Petitioners erroneously assert (petition at p. 6) that "§ 157(b)(5) overrides 28 U.S.C. § 1412, the bankruptcy *forum non conveniens* statute, which permits transfer to other district courts." Section 1412 is the bankruptcy equivalent to 28 U.S.C. § 1404(a), not *forum non conveniens*.

power to fix venue over personal injury tort cases related to the bankruptcy pending in such court." *Baumgart*, 981 F.2d at 832; (Pet. App. 12a) (emphasis in original). There is no support in *White Motor Credit* for the proposition that § 157(b)(5) curtailed the district court's power to dismiss on grounds of *forum non conveniens*.

Accordingly, there is no conflict among the circuits and no reason for the Court to accept this case.

4. THE DISTRICT COURT PROPERLY APPLIED FEDERAL *FORUM NON CONVENIENS* TO DISMISS THIS CASE

Petitioners are incorrect in contending that a "federal-state conflict" was created when the district court, in a case properly removed and over which there was unquestionable federal question jurisdiction, applied federal *forum non conveniens* to dismiss the case in favor of the more convenient German forum. Petitioners cite no authority and Respondent is unaware of any precedent which holds that federal courts, in exercising their inherent powers to dismiss cases on grounds of *forum non conveniens*, *Chambers v. NASCO, Inc.*, ___ U.S. ___, ___, 111 S.Ct. 2123, 2132 (1991), must follow state law in federal question cases. Indeed, the general rule in the federal courts is that *forum non conveniens* is a question of federal, and not state, law, even in diversity cases. *See e.g., In re Air Crash Disaster Near New Orleans, Louisiana*, 821 F.2d 1147, 1153-54 (5th Cir. 1987) (en banc) *vacated in part on other grounds, sub. nom., Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *reinstated*, 883 F.2d 17 (5th Cir. 1989).

Petitioners argue that Texas state law, as set forth in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 671 (1991) was contrary to the prevailing federal rule. The district court considered that argument but properly applied federal law. (Resp. App. 23a). In accordance with the central purpose of any *forum non conveniens* inquiry, which is to ensure that the trial is convenient, *Piper Aircraft Co. v. Reyno*, 454 U.S. at 256 (1981), the district court's order provides for the full and complete adjudication of the responsibility for this accident between all parties – plaintiffs, Fairchild, the German airline and its pilots – in the one convenient forum of Germany. (Pet. App. 30a-31a). The district court certainly did not prejudicially err in declining to follow a contrary state rule which would have necessitated two trials – one in Texas and one in Germany. *See Nolan v. Boeing Co.*, 919 F.2d 1058, 1070 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1587 (1991). Finally, we would point out that Texas has statutorily overruled *Dow Chemical Co. v. Alfaro, supra*, effective September 1, 1993. *See* Tex. Civ. Prac. & Rem. Code § 71.051(a). Thus, Texas' minority position under *Alfaro*, upon which Petitioners would predicate a "federal-state conflict", will be short lived (only three years) and henceforth Texas' stated interest is identical to federal *forum non conveniens* law and the law of at least 40 states. *See Dow Chemical Co. v. Alfaro*, 786 S.W.2d at 703 (Hecht, J. dissenting).

5. PETITIONERS' COMPLAINTS REGARDING ABSTENTION AND REMAND ARE NOT BEFORE THIS COURT, AND EVEN IF THEY WERE, THE DISTRICT COURT CERTAINLY DID NOT CLEARLY ABUSE ITS DISCRETION.

Petitioners assert at p. 4 of their petition, and devote pp. 8-12 of their petition, to the argument that "abstention and remand to the Texas state court was the sole option to trial in the district court." Of course, as just pointed out, the Fifth Circuit correctly held that 28 U.S.C. § 157(b)(5) does not deprive the district court of the "option" to apply the doctrine of *forum non conveniens* in a proper case. In any event, this Court is without jurisdiction to consider Petitioners' argument that "Abstention and remand were appropriate herein" (petition at p. 9) and such argument is without merit.[9]

The first problem with Petitioners' complaint is that the order by which the district court declined to abstain or remand has not been appealed from by Petitioners. As material here, the district court entered three separate orders: (1) "Order Adopting Bankruptcy Court's Recommendation And Order Withdrawing Reference to Bankruptcy Court," signed July 30, 1990. (Resp. App. 50a); (2) "Order Granting Defendants' Motion to Dismiss on Ground of *Forum Non Conveniens*" signed September 30, 1991 (Pet. App. 22a); and final "judgment," dismissing

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[9] Indeed, in the court of appeals, Petitioners apparently realized that appellate review was precluded. Petitioners conceded, in the court of appeals, that "appellants are not seeking review of the denial of abstention and remand by the court below." (Reply brief of appellants in the court of appeals at p. 10, n.4).

the case, signed September 30, 1991 (Resp. App. 53a). Petitioners' notice of appeal, filed October 14, 1991, is directed only to "the Order Granting Defendants' Motion to Dismiss on Grounds of Forum Non Conveniens entered in this action on September, 30, 1991"; such notice makes no mention of the July 30, 1990, order denying Petitioners' motion to abstain or remand – nor, indeed, does it mention the final "Judgment." (Resp. App. 56a). Thus, the separate order of July 30, 1990, denying Petitioners' motion to abstain or remand, is not before this Court. *Chaka v. Lane*, 894 F.2d 923, 925 (7th Cir. 1990); *May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981).

In the second place, even if Petitioners had attempted an appeal from the order denying abstention or remand, appellate review thereof nevertheless is statutorily prohibited. Petitioners moved for discretionary abstention under 28 U.S.C. § 1334(c)(1). (Resp. App. 13a). However, 28 U.S.C. § 1334(c)(2) sets forth a restriction on appellate review of orders denying (or granting) discretionary abstention under § 1334(c)(1). Section 1334(c)(2) provides in part:

> Any decision to abstain or not abstain made under *this subsection* is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1334(c)(2). (emphasis added). "There is no sentence regarding appealability in § 1334(c)(1); however, the fact that the language quoted above refers to decisions made under 'this subsection,' and not just under

'this paragraph,' leads to the conclusion that there is no right to appeal from a decision to abstain or not abstain made pursuant to section 1334(c)(1)." 1 *Collier on Bankruptcy*, § 3.01 p. 3-73 (15th ed. 1990). The Fifth Circuit has held the limitation on appellate review set forth in § 1334(c)(2) applies to discretionary abstention under § 1334(c)(1). *In re Adams*, 809 F.2d 1187, 1188 (5th Cir. 1987).

Similarly, the district court's decision not to remand is not subject to appellate review. 28 U.S.C. § 1452(b) specifically provides that such an order "is not reviewable by appeal or otherwise" by the court of appeals or this Court. The lower courts have repeatedly held that jurisdiction is lacking to review a district court's decision on remand. *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987); *In re Adams*, 809 F.2d at 1189; *Matter of Rayburn Enterprises, Inc.*, 781 F.2d 501 (5th Cir. 1986). Accordingly, that portion of the question presented for review regarding abstention and remand is simply not before this Court.

However, even if we could agree that the district court's order is reviewable, Petitioners could not establish that the district court's decision, supported by its own and the bankruptcy court's thorough opinions, represented a clear abuse of its discretion. To begin with, 28 U.S.C. § 1334(c)(1) does not *require* abstention; indeed, the statute says that "Nothing in this section prevents" a discretionary abstention. As a leading bankruptcy treatise notes, § 1334(c)(1) "is not mandatory; it merely gives the district court the discretion to abstain. . . . " 1 *Collier on Bankruptcy*, § 3.01 p. 3-72 (15th ed. 1990).

The Fifth Circuit, in *Browning v. Navarro*, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984), has set forth numerous factors to guide the exercise of the district court's discretion in deciding motions to abstain and remand. The bankruptcy court and district court carefully analyzed and adhered to these factors, including *forum non conveniens*, judicial economy, comity and respect for state court's decision-making capabilities, effect of bifurcating claims and parties and the possibility of inconsistent results, predominance of state law issues and nondebtor parties, the presence of insurance coverage, and prejudice to the parties to the action. (Resp. App. 20a-38a). The bankruptcy court received evidence and heard argument. The district court made a *de novo* review of the bankruptcy court's recommendation, reviewed the documents submitted to the bankruptcy court, and adopted the bankruptcy court's report. (Resp. App. 50a-51a). There is no occasion for this Court to review such factual and equitable determinations by two able judges.

Petitioners continue to characterize their causes of action as "state" claims. (petition at p. 9). However, the district court determined "that the law of Germany, and not that of Texas, applies to this case." *Baumgart*, 981 F.2d at 837 n. 16. (Pet. App. 21a). As held by the Fifth Circuit, Petitioners' complaints to the contrary "are without merit." *Id.* at 837 (Pet. App. 21a).

Petitioners also insist (petition at p. 12) that certiorari should be granted in this case to "discourage forum shopping." Respondent will set aside the separate issue of whether 19 different lawsuits brought by 19 German families in 16 different state courts before 16 different judges in San Antonio, Texas (and filed by the same law

firm) was any evidence of "forum shopping" by Petitioners. In any event, this argument, again, was considered and properly rejected by the court below. (Resp. App. 23a-27a, 37a). As the bankruptcy court noted, "Bankruptcy itself created the legally sufficient grounds for removal under Section 1452(a), a statute that does not contain the limitations which Section 1445 places on ordinary removal, evincing a Congressional intent that removal be more generally available (and more generously indulged) in bankruptcy cases." (Resp. App. 37a). Furthermore, Petitioners' allegation is, of course, no basis upon which to remand or abstain. When a party may "lawfully qualify" for federal jurisdiction, its "motive" in insisting upon its right to a federal tribunal is immaterial. *See Chicago v. Mills*, 204 U.S. 321, 330 (1907); *Nolan v. Boeing Co.*, 919 F.2d at 1068. Petitioners conceded that Respondent's removal "lawfully qualifies"; in the words of Petitioners' brief to the court of appeals, Respondent had "the automatic right of removal given to debtors under 28 U.S.C. § 1452." (Appellants' brief in court of appeals, p. 24).

Petitioners' reliance (at p. 12 of their petition) upon *United States v. National City Lines, Inc.*, 335 U.S. 573, 596-97 (1948) was persuasively demonstrated by the Fifth Circuit to be inapplicable to this case. *Baumgart*, 981 F.2d at 829-830; (Pet. App. 5a-7a).

Petitioners further allege that Respondent "used its bankruptcy filing to remove these cases to federal court three weeks after the *Alfaro* decision for the admitted purpose of seeking *forum non conveniens* dismissal not available in state court" (petition at p. 10) and thereby

contend that Respondent received a "windfall." Such suggestions are without merit. The uncontrovertible fact – found by the bankruptcy court, the district court and the Fifth Circuit – is that Fairchild's bankruptcy was wholly unrelated to this litigation; in other words, as found by all three courts below (see p. 4 hereof), Fairchild did not file bankruptcy in order to remove these cases to federal court. Second, Respondent has not obtained a windfall, but rightly insisted upon its prerogative to remove 19 separate lawsuits to one federal court. For the convenience of the parties, Respondent had the legal right to move, and the district court possessed the inherent power and discretion to order, that these cases be dismissed in favor of the single forum, Germany, which allows for the complete adjudication of this dispute with the presence of all parties.

Finally, Petitioners' reliance (pp. 10-11 of the petition) upon the *Younger* doctrine and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) is entirely misplaced. First of all, contrary to Petitioners' assertion, this argument was considered by the bankruptcy court below. (Resp. App. 16a). The bankruptcy court correctly reasoned that:

> The *Younger* abstention doctrine has no application to the facts of this case. *Younger v. Harris*, 401 U.S. 37 (1971). There are no compelling state interests implicated by resolving a claim against a bankruptcy estate within the federal system.

(Resp. App. 16a). We would add that, unlike the situations presented in *Younger* and in *Pennzoil*, no state court proceedings remained pending after Respondent's removal to federal court. Indeed, this Court has "never

applied the notions of comity so critical to *Younger's* 'Our Federalism' when no state proceeding was pending. . . ." *Ankenbrandt v. Richards*, ___ U.S. ___, ___, 112 S.Ct. 2206, 2216 (1992). "Absent any *pending* proceedings in state tribunals, therefore, application by the lower courts of *Younger* abstention" would be "clearly erroneous." *Id.*

CONCLUSION

This case raises no issue worthy of review by this Court. Respondent respectfully requests that the petition for writ of certiorari be denied.

May 24, 1993

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE

FAIRCHILD AIRCRAFT CORPORATION, DEBTOR	§	BANKRUPTCY CASE NO. 90-50257C
GERTRUDE BAUMGART, Individually, and as Personal Representative of the Estate of Hans-Joachim Baumgart and HANNS-SEBASTIAN BAUMGART and BABETTE BAUMGART Plaintiffs	§	CHAPTER 11
v.	§	ADV. NO. 90-5131C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

MAGRET KOELLER, Individually, and as Personal Representative of the Estate of RAINER KOELLER, Plaintiffs	§	
v.	§	ADV. NO. 90-5132C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

REGINE GRIGOLEIT, Individually, and as Personal Representative of the Estate of UDO GRIGOLEIT and as the mother and natural guardian of BIANCA GRIGOLEIT, a minor, Plaintiffs	§	ADV. NO. 90-5133C
v.	§	
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

CHRISTIANE HENNIG, Individually, and as Personal Representative of the Estate of Werner Hennig and as the mother and natural guardian of THOMAS HENNIG and THORSTEN HENNIG, minors Plaintiffs	§	
v.	§	ADV. NO. 90-5134C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

JUGE FISS, Individually and as Personal Representative of the Estate of KARL-HEINZ FISS, and as mother and natural guardian of CHRISTOPHER-DAVID FISS and ANN-CATHRIN FISS, minors, Plaintiffs	§	
v.	§	ADV. NO. 90-5135C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

BRIGITTE NABER, Individually, and as Personal Representative of the Estate of DR. GERD NABER, and as mother and natural guardian of TYLL NABER, a minor, Plaintiffs	§	
v.	§	ADV. NO. 90-5136C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

MARIE-LUISE FRICKE, Individually, and as Personal Representative of the Estate of MARTIN FRICKE, and as the mother and natural guardian of DIRK FRICKE, a minor Plaintiffs	§	
v.	§	ADV. NO. 90-5137C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

ERIKA HAFERKORN, Individually, and as Personal Representative of the Estate of Herman Haferkorn and SILKE HAFERKORN and ARNE HAFERKORN, Plaintiffs	§	
v.	§	ADV. NO. 90-5138C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

MARIE-LUISE REMMERS, Individually, and as Personal Representative of the Estate of DIETER REMMERS, and UTE REMMERS, JONS REMMERS, ELKE REMMERS, and DIRK REMMERS, Plaintiffs	§	
v.	§	ADV. NO. 90-5139C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

DOROTHIE SCHMIDT, Individually and as Personal Representative of the Estate of LOTHAR SCHMIDT, and as the mother and natural guardian of STEPHAN SCHMIDT, THOMAS SCHMIDT, and JUDITH SCHMIDT, minors, Plaintiffs	§	
v.	§	ADV. NO. 90-5140
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

URSALA SCHUBERT, Individually and as Personal Representative of the Estate of ANURCAS SCHUBERT, and as the mother and natural guardian of TANJA SCHUBERT, a minor, Plaintiffs	§	
v.	§	ADV. NO. 90-5141
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

HELGA TENNHARD, Individually and as Personal Representative of the Estate of KLAUS TENNHARD, Plaintiffs	§	
v.	§	ADV. NO. 90-5142C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

5140C

ROGER SCHOLZ and FRITZ-BROWN SCHOLZ, Individually and as Personal Representatives of the Estate of HERBERT SCHOLZ Plaintiffs	§	
v.	§	ADV. NO. 90-5143C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

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KARIN SOTONYI, Individually and as Personal Representative of the Estate of TAMAS SOTONYI Plaintiffs	§	
v.	§	
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	ADV. NO. 90-5144C
GISELA SELLMAN, Individually and as Personal Representative of the Estate of HEINREICH SELLMAN, Plaintiff	§	
v.	§	
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	ADV. NO. 90-5145C

KATE WINTER, Individually and as Personal Representative of the Estate of HERMANN WINTER and BIRGIT WINTER and TORSTEN WINTER Plaintiffs	§	
v.	§	ADV. NO. 90-5146C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

PETER HELLMER, Individually and as Personal Representative of the Estate of JURGEN HELLMER, and JRMA HELLMER, Plaintiffs	§	
v.	§	ADV. NO. 90-5147C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

JANICE MARIE MORRIS, Individually and as Personal Representative of the Estate of HAROLD ANTHONY MORRIS, and RICHARD PAUL MORRIS and ANDREA LORRAINE MORRIS, Plaintiffs	§	
v.	§	ADV. NO. 90-5148
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

ELSBETH ROSKE, Individually and as Personal Representative of the Estate of JOACHIM ROSKE, deceased, and AXEL ROSKE and DETLEV ROSKE, Plaintiffs	§	ADV. NO. 90-5149
v.	§	
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

REPORT AND RECOMMENDATION ON MOTION TO ABSTAIN OR REMAND

Came on for hearing before this Court the Plaintiffs' Motions to Abstain or to Remand and the Defendants' Response thereto in the above referenced nineteen adversary proceedings. Pursuant to Bankruptcy Rules 5011(b) and 9027(e), this court submits this its Report and Recommendation to the United States District Court with respect to the Motions. For the reasons set forth herein, this court recommends that the district court deny the motion for discretionary abstention and the motion for remand in each of the proceedings, on equitable grounds, and further recommends that the district court enter an order pursuant to 28 U.S.C. § 157(c)(5) setting these adversary proceedings on its civil docket for trial of the plaintiffs' claims.

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REPORT

I. Background

The instant adversary proceedings allege that, on February 8, 1988, Hans-Joachim Baumgart, Rainer Koeller, Udo Grigoleit, Werner Hennig, Karl-Heinz Fiss, Gerd Naber, Martin Fricke, Herman Haferkorn, Dieter Remmers, Lothar Schmidt, Anurcas Schubert, Klaus Tennhard, Herbert Scholz, Tamas Sotonyi, Heinreich Sellmann, Hermann Winter, Jurgen Hellmer, Harold Anthony Morris, and Joachim Roske, all West German nationals, were passengers aboard an aircraft designed and manufactured by the defendants and that the aircraft crashed near the town of Kettwig, West Germany, causing the decedents to suffer severe personal injuries that resulted

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in their deaths. Plaintiffs further allege that the subject aircraft was struck by lightning during flight and that, because of defects in the aircraft's electrical system, the strike rendered the aircraft uncontrollable. Plaintiffs allege that a properly designed and manufactured aircraft would have continued to operate, allowing the aircraft to complete its flight.

Based on the these allegations, the various plaintiffs filed nineteen separate lawsuits against Defendants in the sixteen different district courts of Bexar County, Texas on January 10, 1990, shortly before the expiration of the applicable statute of limitations. Each of the Plaintiffs' Original Petition and Jury Demand alleges causes of action based on strict liability, breach of warranty, negligence and gross negligence. Plaintiffs each seek wrongful death and survival damages, prejudgment interest and exemplary damages under Texas state law.

On February 1, 1990, Defendants filed a voluntary Chapter 11 bankruptcy petition, for reasons having nothing to do with this litigation.[1] The bankruptcy case is currently pending before this court. On April 20, 1990,

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[1] Swearingen Aviation is the predecessor in interest of Fairchild. Infighting among Fairchild's competing shareholder groups led to severe lapses in management, followed by layoffs, and eventual pressure from the company's principal lender, Sanwa Business Credit. The bankruptcy was filed in consultation with Sanwa, with an understanding that the debtor would immediately seek the appointment of a Chapter 11 Trustee to take over the company's affairs. A trustee was in fact appointed, with the cooperation and assistance of Sanwa, and is currently operating the company with a post-petition financing facility from Sanwa.

Defendants removed each of the state court suits to this court, initiating these adversary proceedings. On May 3, 1990, Plaintiffs filed their Motion to Abstain or Remand.

II. Motion to Abstain

Plaintiffs move for discretionary abstention under 28 U.S.C. § 1334(c)(1). Plaintiffs also seek remand of all of the cases to state court under 28 U.S.C. § 1452(b). As a general rule, abstention is inapposite in the context of a removed action in a bankruptcy case. *In re 666 Associates*, 57 Bankr. 8, 12 (Bankr. S.D.N.Y. 1985). As Judge Abram correctly observed, the mechanics of abstention

> are premised on the existence of *two* proceedings: one in bankruptcy court and a second one in the state court. Indeed if there were only one proceeding, and the court abstained with respect to it, nothing would go forward. In a removed action, there is perforce only one proceeding once removal has been made.

Id.; *but see In re Chiodo*, 88 Bankr. 780, 785 (W.D.Tex. 1988).[2]

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[2] With all due respect to my former colleague, Judge R. Glen Ayers, Jr., I must disagree with his interpretation of the interplay between Sections 1334(c) and 1452(b). The premise of Judge Ayers' decision is that there will never be an occasion to invoke abstention other than to actions removed from state court (at least in cases of mandatory abstention). *In re Chiodo*, 88 Bankr. at 785 ("this [Judge Abram's] reasoning reads subsection (c)(2) out of section 1334"). However, it is not difficult to envision a debtor initiating a compulsory counterclaim by way of an independent action brought in a bankruptcy adversary proceeding, in lieu of asserting the claim in the state court action where

Even if discretionary abstention is appropriately considered in the context of a removed action,[3] the court should consider the remand issue first. Section 1452(a) confers broad authority to centralize in a single forum the disparate litigation that typically accompanies a bankruptcy. The statute tends to further the congressional policy underlying the Bankruptcy Reform Act of 1978 that favors a single forum for the adjudication of all matters relating to the bankruptcy case, a clear departure from the fragmentation that marked the administration of cases under the former Bankruptcy Act. *See* H.Rep. No. 595, 95th Cong, 1st Sess 45 *et seq.* (1977); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 n. 40 (1982) ("[i]ndeed, we note that one of the express purposes of the [Bankruptcy Reform Act of 1978] was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes"); *A. H. Robins v. Piccinin*, 788 F.2d 994, 1014 (4th Cir. 1986) ("[n]o progress along estimating these contingent claims, however, can be made until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claims with one another may be harmonized"). The broad language of Section 1452(b), governing remand of actions removed in the context of bankruptcy, furthers this policy by permitting the district court the power to decide

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the debtor is the defendant. As the matter no doubt involves the same transaction, abstention (even mandatory abstention) could well apply, even though the removal statute had not come into play. The premise of *Chiodo* is thus faulty.

[3] Judge Abram suggests that it might be. *See In re 666 Associates*, 57 Bankr. at 12.

remand motions on any equitable grounds, and to do so without further review. 28 U.S.C. § 1452(b).[4]

Thus, if discretionary abstention is available, it should not be employed in a manner that works to undermine this important bankruptcy policy. Abstention is not a favored doctrine in the federal system in any event.

> This Court repeatedly has stated that the federal courts have a "virtually unflagging obligation" to exercise their jurisdiction except in those extraordinary circumstances " 'where the order to the parties to repair to the State court would clearly serve an important countervailing interest.' "

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[4] The prohibition on review of remand decisions is a significant adjunct to the bankruptcy removal process and indicates how important it is to that process that the trustee be afforded a single forum for the speedy adjudication of disputes.

> It is in the interests of all concerned to get to the merits of the proceeding as promptly as possible. To this end, the decision of a district court made under section 1452(b) is final when entered and cannot be attacked either at the time it is made or later. The decision may not be collaterally attacked as by mandamus or other proceedings.

1 *Collier on Bankruptcy*, ¶ 3.01[5][g], at page 3-99 (15th ed. 1989), *referring to* 1A *Moore's Federal Practice*, ¶ 0.169[2.-1] (2d ed. 1987). The policy of promoting a single forum for speedy adjudication becomes most significant when matters close to the core of bankruptcy (such as the allowance or estimation of claims) are involved. *See Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947); *Lesser v. Gray*, 236 U.S. 70, 74 (1915); *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217 (1915).

Deakins v. Monaghan, 484 U.S. 193, 108 S.Ct. 523, 530 (1988), *citing Colorado River Water Conservation District v. U. S.*, 424 U.S. 800, 813 (1976) *and Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-15 (1983). The federal court's jurisdiction has been properly invoked here. 28 U.S.C. §§ 1334(a), 1452(a); *see* 11 U.S.C. § 502 (relating to the allowance and disallowance of claims). Federal courts are not permitted to use abstention to shirk their duty, as it were, where the jurisdiction of the court has otherwise been appropriately invoked, absent the presence of clear equitable considerations warranting abstention.[5]

Section 1452(b) already directs the court to take equitable considerations into account when deciding a motion to remand. 28 U.S.C. § 1452(b) ("the court to which such claim or cause of action is removed may remand such claim or cause of action *on any equitable grounds*"). Thus, as a practical matter, the scope of review on the motion to

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[5] The *Younger* abstention doctrine has no application to the facts of this case. *Younger v. Harris*, 401 U.S. 37 (1971). There are no compelling state interests implicated by resolving a claim against a bankruptcy estate within the federal system. Even in in *Pennzoil Co. v. Texaco, Inc.*, one of the broader applications of the *Younger* doctrine, Justice Powell cautioned that

> [o]ur opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court. Rather, as in *Juidice*, we rely on the State's interest in protecting "the authority of the judicial system, so that its orders and judgments are not rendered nugatory."

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 1527 n. 12 (1987).

remand already encompasses the motion for discretionary abstention. In general, if remand is not appropriate, then neither is discretionary abstention. *In re Chiodo*, 88 Bankr. at 785; *In re Baren*, 47 Bankr. 39, 42-43 (Bankr. N.D.Ill. 1984).[6]

The court therefore recommends that the motions for discretionary abstention be controlled by the decision on the motions for remand, discussed below.

Plaintiffs did not move for mandatory abstention under 28 U.S.C. § 1334(c)(2). That subsection, by its own terms, requires the timely motion of a party for its invocation. *Id.*; *In re 666 Associates*, 57 Bankr. 8, 12 (Bankr. S.D.N.Y. 1985). As plaintiffs did not request mandatory abstention in their motion, it is now too late to urge it. Mandatory abstention also only applies to those cases which could not have been commenced in a federal court. This matter could have been, as it falls within the diversity jurisdiction of the federal courts. 28 U.S.C. § 1332(a)(2) (suits between citizens of a state and citizens of a foreign state).

This is certainly *not* to say that the considerations enumerated in Section 1334(c)(2) might not inform a court's decision to grant or deny a motion to remand, as the court may remand a case on *any* equitable ground, including grounds identical to those set out in the mandatory abstention section of Section 1334. By the same

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[6]The exercise [of] discretionary abstention, provided for in section 1334(c)(1), would essentially consist of an examination of the same equitable considerations addressed by the Court by motions to remand.
In re Baren, 47 Bankr. at 44.

token, a court may also *deny* a motion to remand *notwithstanding* the presence of the mandatory abstention elements set out in Section 1334(c)(2).

III. Motion to Remand

As noted above, the removal/remand scheme in Section 1452 is an important adjunct to the entire bankruptcy "single forum" scheme envisioned by Congress in the passage of the Bankruptcy Reform Act of 1978. H.Rep. No. 595, 95th Cong, 1st Sess 45 *et seq.* (1977); *Marathon, supra; A. H. Robins, supra.* In service to that policy, the scope of bankruptcy removal is thus considerably broader than that available for ordinary civil actions outside of bankruptcy. *Browning v. Navarro,* 743 F.2d at 1076 n. 21. Section 1452 permits the removal of any action provided (1) the matter is not a Tax Court proceeding, (2) the matter is not an enforcement action by a governmental agency exercising its police or regulatory power, and (3) the district court has jurisdiction of the claim or cause of action under Section 1334. 28 U.S.C. § 1452(a).[7]

Outside of bankruptcy, removal to federal district court is not automatically sanctioned. *Adolph Coors Co. v.*

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[7] The general removal statutes applicable to civil actions removed to federal court, by contrast, render removal subject to whatever limitations might be placed on removal by other federal laws, prohibit removal if one of the defendants is a resident of the state in which the action is brought, and exclude civil actions against railroads, their receivers or trustees, civil actions against common carriers, their receivers or trustees (if less than $10,000) and civil actions arising under state worker compensation laws. 28 U.S.C. §§ 1441, 1445.

Sickler, 608 F.Supp. 1417 (C.D.Cal. 1985); 14 Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3739 (1976). Removal petitions not involving bankruptcy are either subjected to an evidentiary hearing to determine whether the removal petition should be granted or are summarily dismissed based on the district court's review of the moving papers. 28 U.S.C. § 1446. By contrast, bankruptcy removal is automatic. The matter once removed stays in the federal system for trial, without further review or consideration by the court, unless a party specifically requests remand. 28 U.S.C. § 1452(a), (b).

A district court's decision *not* to remand a civil action removed under Section 1447 is reviewable for abuse of discretion upon the entry of a final, appealable order. The same court's decision not to remand an action removed under the bankruptcy removal statute, however, is *not* reviewable, not even for an abuse of discretion. *Browning v. Navarro*, 743 F.2d at 1076 n. 21.[8]

The differences between the two schemes clearly demonstrate the overarching policy that favors the consolidation of matters relating to a bankruptcy case in the federal system and that disfavors piecemeal disposition of bankruptcy-related matters in multiple forums. The

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[8] Review may be had of an order denying a motion to remand in the narrow circumstance in which the district court lacks subject matter jurisdiction of the entire underlying matter. *Browning v. Navarro*, 743 F.2d at 1076 n. 21. That is not the situation here, however. The subject matter of the litigation is the adjudication of claims against the estate, a matter clearly arising under the Bankruptcy Code (11 U.S.C. § 502). 28 U.S.C. § 1334(b).

bankruptcy removal statute performs the necessary function of giving the debtor's legal successor-in-interest, the trustee in bankruptcy,[9] the unquestioned power to assemble disparate litigation pending in multiple forums into the single forum furnished by Section 1334.

Remand of an action properly removed pursuant to Section 1452 must be undertaken with these policy considerations in mind. The Fifth Circuit in *Browning v. Navarro* laid out some of the equitable grounds a court might evaluate in deciding a motion to remand an action removed to a federal court in the context of a bankruptcy. They include:

> (1) forum non conveniens;
>
> (2) a holding that, if the civil action has been bifurcated by removal, the entire action should be tried in the same court;
>
> (3) a holding that a state court is better able to respond to questions involving state law;
>
> (4) expertise of the particular court;
>
> (5) duplicative and uneconomic effort of judicial resources in two forums;
>
> (6) prejudice to the involuntarily removed parties;
>
> (7) comity considerations; and

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[9] The chapter 11 trustee in this case was appointed approximately a month after the case was filed and was given control of and responsibility for the company and its assets. She was, of course, not involved with the company when this lawsuit was instituted. She has inherited this claim just as she inherited all of the other claims against the estate.

(8) a lessened possibility of an inconsistent result.

Browning v. Navarro, 743 F.2d 1069, 1076 n. 21 (5th Cir. 1984) (decided under the predecessor statute to Section 1452, 28 U.S.C. § 1478(b)). An analysis of these considerations, in light of the underlying intentions of Congress as discussed above, leads me to recommend that remand of these actions to state court is neither necessary, appropriate nor equitable. That analysis follows.

(1) First, there are nineteen lawsuits currently pending before sixteen different judges in Bexar County, all of which were brought by the same lawfirm. Although the plaintiffs' lawyers assure the court that they will seek consolidation of these matters before a single judge as a precondition to remand of these cases, there is no guarantee that all the current judges before whom the cases are pending will consent to such a consolidation. Furthermore, plaintiffs rely on Rule 42 of the Texas Rules of Civil Procedure as their authority for consolidation of these cases. That rule, however, sets out the procedure for maintaining a *class action* in state court. Those standards do not apply to these cases. *See* Tex.R.Civ.P., Rule 42(a).[10]

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[10] Under that rule, an action can only be maintained as a class action if it meets the prerequisites of subsection (a), which in turn specifies that the court find that "the class is so numerous that joinder of all members is impracticable." Tex.R.Civ.P., Rule 42(a). Nineteen plaintiffs is a lot of plaintiffs, but their joinder is not impracticable. One wonders why they were not joined in a single lawsuit in the first place, unless the plaintiffs sought to exploit whatever procedural advantages (or disadvantages, from the defendant's point of view) might accrue from having multiple cases before different judges. Per-

Procedural consolidation of the adversary proceedings in federal district court is, by comparison, quite simple. Rule 42(a), Fed.R.Civ.P. Consolidation reduces the likelihood of inconsistent results, reduces litigation costs, and permits the court to fashion mechanisms for streamlining discovery, pretrial and trial. *See Browning v. Navarro, supra; see also* note 6 *supra*. Because all nineteen of these cases represent similar claims against the same bankruptcy estate, the equities do not favor remand or retention.

Contrary to plaintiffs' assertions, the defendant has never had an opportunity to seek consolidation of these matters in state court. The answer date for these lawsuits fell on a date after the bankruptcy filing, at which time the statutory *automatic* stay halted the litigation. The chapter 11 trustee appointed in this bankruptcy case then elected to exercise her removal rights under Section 1452(a), bringing all nineteen of the lawsuits into a single court, foregoing the more cumbersome and less predictable consolidation process in the sixteen state courts. The trustee has thus elected what appears to her (and to this court) to have been the more efficient means for achieving consolidation of these cases, initiated by this removal application. The trustee is justified in concluding that, from her point of view, the claims adjudication process will be more streamlined before one federal judge than before sixteen state judges.[11]

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haps they hoped to increase the chances of a large award by having nineteen chances at it.

[11] This is especially true because the ultimate issue of allowance of the claims against the estate will be decided by the

(2) Second, the claim which underlies these lawsuits originates out of an aircraft crash in Germany, raising questions about *forum non conveniens*. *Browning v. Navarro, supra*. Plaintiffs have ignored this ground for remand, so clearly referenced in *Browning v. Navarro*, and have instead focused on their contention that the *forum non conveniens* doctrine was not available as a grounds for dismissal in the state forum they had originally selected.[12] They divine from the bankruptcy trustee's removal to federal court an intent to subvert or avoid this state court rule. Accusing the defendant of "forum shopping," plaintiffs conclude that the tactic should not be sanctioned by permitting the removals to stand.[13]

We must distinguish between the application of *forum non conveniens* to the case on the merits and the application of the doctrine for purposes of deciding the motions

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federal court. *See Katchen v. Landy*, 382 U.S. 323, 330 (1966); *Pepper v. Litton*, 308 U.S. 295, 304 (1939); *In re Manville Forest Products Corp.*, 896 F.2d 1384 (2d Cir. 1990), *cited in In re Chateaugay Corp.*, 111 Bankr. 67 (Bankr. S.D.N.Y. 1990).

[12] The Texas Supreme Court recently decided that *forum non conveniens* is not a valid defense or ground for dismissal of an action brought in state court. *Dow Chemical Co. v. Alfaro*, 33 Tex. Sup. Ct. J. 326 (March 28, 1990). The rule is different in federal court. *Piper Aircraft Co. v. Reyno*, 102 S.Ct. 265, 266 (1981); *see Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 504 (1946).

[13] In point of fact, removal is *typically* invoked to avoid an unfavorable forum. In fact, it is one of the more common routes by which diversity cases find their way into federal court. The underlying rationale for diversity jurisdiction was the perception that a foreign defendant might not like the local forum the local plaintiff had picked for it. The theory of diversity was that it would afford the foreign defendant an impartial forum before a federal tribunal appointed by the national government.

for remand. While related, the focus of the inquiry for remand consideration is slightly different. The proper question to ask, under *Browning v. Navarro*, is whether the state court forum is an inconvenient forum, relative to the federal forum, or vice versa. Plaintiffs complain that the federal forum is "inconvenient" because plaintiffs might be subjected to a dismissal here (on *forum non conveniens* grounds). Defendant correctly notes, however, because the state forum forces it to proceed in an inconvenient forum (i.e., Texas as opposed to West Germany) by virtue of the *Alfaro* decision (note 12, *supra*), the state forum has *itself* become an inconvenient forum for purposes of considering the remand action. On balance, the more important question to resolve, for purposes of evaluating the remand motion, is whether, as a result of the forum in which this case goes forward (state court versus federal court), one or the other party will be forced to litigate in an inconvenient forum, as demarcated by the *forum non conveniens* doctrine (i.e., Texas versus West Germany). To resolve this question, we must of necessity visit the underlying *forum non conveniens* issue.

In these cases, we note that (1) the accident occurred in West Germany, (2) the pilots were West German, (3) the airline was West German, (4) all of the plaintiffs are West German, and (5) Texas is one of the few states that entertains suits in her state courts initiated by foreign nationals.[14] As defendant correctly points out in its

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[14] Local jury awards are also fast giving our city the reputation as a great place to bring a personal injury suit, a fact certainly not lost on plaintiffs' counsel, who no doubt pursue this case on a contingency fee, giving them nearly as great an

responsive brief, the Supreme Court sanctioned the application of *forum non conveniens* dismissal to a case both factually and procedurally similar to these cases. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 265, 266 (1981). The Supreme Court there made the following telling observations, all of which apply here:

(a) Fewer evidentiary problems were posed by the trial being held where the accident occurred, even though the plaintiffs there also contended that records associated with the design and manufacture of the alleged defective part were in the United States. In the cases at hand, substantial discovery will have to take place in Germany, including depositions of each of the nineteen families, depositions of the airline crew, depositions of the airline company, depositions of air traffic controllers in Germany, and the review of significant documents located in Germany. The plaintiffs' discovery is but one side of the story. Ease of discovery from the point of view of the plaintiffs alone hardly puts an end to the issue.

(b) The defendant in *Piper Aircraft* faced greater problems with impleading third-party defendants in the United States than it would were the action initiated in the country in which the third-party defendants resided. The defendant here faces a similar problem, as it desires to bring in the West German airline, the West German flight crew, and the West German air traffic control entity.

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economic interest in the locale and ultimate outcome of the litigation as the plaintiffs themselves.

If these third-party defendants cannot be impleaded, separate actions for indemnity and contribution would have to be initiated in the foreign forum. It would be more convenient to resolve all the related claims in one trial, especially in view of the "single forum" policy considerations which predominate in bankruptcy. *See* discussion *supra*.

(c) The Court in *Piper Aircraft* found that proceeding in the foreign jurisdiction might also serve the public interest, because, for example, there might be a need to apply the law of the jurisdiction in which the accident took place. In view of the fact that the pilot, the air carrier, the plaintiffs and the situs of the accident in these cases are all West German, West German law will likely apply to the cases under choice of law authorities in both Texas and federal courts. *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979); *Harris v. Polskie Lineie Lotnicze*, 820 F.2d 1000, 1003-04 (9th Cir. 1987); *Corporacion Venegonlana de Fomenta v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied* 101 S.Ct. 863 (1981). The nation in which the accident took place also has a strong interest in the litigation because it occurred in its airspace. Here, the West German government has already issued its report indicating *its* conclusions as to fault. Finally all the decedent's survivors are residents of the foreign jurisdiction.

The facts of these cases strongly suggest that the suits should have been initiated in Germany against the air carrier and the pilots as well as the debtor in the first place. There is thus a significant likelihood that, if the *forum non conveniens* doctrine is applied to the cases on their merits, the defendant's position will be upheld, mandating that the actions be instituted in West Germany

if they are to be entertained at all. The state court forum which, under *Alfaro*, refuses to afford the defendant an opportunity to even raise this issue is thus *itself* an "inconvenient forum." On this ground, then, remand to that forum would not appear to be equitable. *Browning v. Navarro*, 743 F.2d at 1076 n. 21.

At the very least, there is no equitable reason why these actions *must* be tried in the state court when federal courts are well familiar with mass tort and multi-district litigation similar to these cases and with the application of foreign law to those sorts of proceedings. *See, e.g.*, 28 U.S.C. § 1407; *In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2d Cir.), *cert. denied*, 108 S.Ct. 695 (1987); *In re Korean Air Lines Disaster of September 1, 1983*, 575 F. Supp. 342 (Jud. Pan. Multi. Lit. 1979).[15]

(3) The third ground for recommending denial of the motion for remand is that the lawsuits directly involves property of the bankruptcy estate, over which the federal courts have exclusive jurisdiction. 28 U.S.C. § 1334(d). Circuit courts in at least five circuits, including this one, have held that insurance coverage is property of the bankruptcy estate. *See MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 109 S.Ct 176 (1988); *National Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325 (8th Cir. 1988); *Tringali v. Hathaway Mach. Co.*, 796 F.2d 553 (1st Cir. 1986); *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S.

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[15] Plaintiffs could hardly complain that West Germany is an inconvenient forum for them, as they are West German nationals.

876 (1986); *Minoco Group of Companies, Ltd. v. First State Underwriters Agency of New England Reinsurance Corp. (In re Minoco Group of Companies, Ltd.)*, 799 F.2d 517 (9th Cir. 1986); *In re Davis*, 730 F.2d 176 (5th Cir. 1984). The incident from which these lawsuits arose is not the only claim against the insurance coverage now held by the debtor. There is here the very real prospect of multiple competing claims against a single *res*, not only from these multiple plaintiffs in these nineteen separate lawsuits but also from plaintiffs in other covered incidents. These claims should be adjudicated in a single forum to maximize ratable distributions and to minimize the cost of litigation.[16] This court is the more appropriate forum to handle competing claims over property of a bankruptcy estate, over which this court has exclusive jurisdiction. *See* 28 U.S.C. § 1334(d).

The bankruptcy estate's property interests are further affected by this litigation because of the deductible and indemnity provisions of the insurance policies. The claims here in question are apparently insured through member companies of Associated Aviation Underwriters, but carries a $2 million annual aggregate deductible, covered by a letter of credit. A call on the letter of credit would further impair estate assets.[17] In addition,

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[16] The insurance company is covering the cost of defending the nineteen suits involved in these motions for remand, but that cost is (or may be) billed against the debtor's deductible. The greater the cost of defense, the greater the burden on the debtor and its creditors.

[17] The court recognizes that the letter of credit is itself not property of the estate and that the pledge against estate assets to secure that letter of credit already fully encumbers those assets

Transamerica Insurance Company evidently issued a policy for a 20% quota share, reinsured by Americas Insurance Company. The debtor was allocated a self-insured retention of this 20% quota share and agreed to indemnify Americas against liability covered by the policy, entitling Americas to a claim against Fairchild for its 20% share of $8 million of aggregate coverage in excess of the $2 million deductible up to $10 million, an additional $1.6 million of claim against Fairchild. The estate's exposure could thus reach $3.6 million. The plaintiffs' contention that the estate is not affected by this litigation because of the presence of insurance coverage is thus disingenuous.

(4) Fourth, and perhaps most significant, the federal district court has exclusive jurisdiction to hear and determine the allowance and estimation of these claims. 28 U.S.C. § 1334(a); 11 U.S.C. § 502(b), (c); *Katchen v. Landy*, 382 U.S. 323, 328-30 (1966). Even were these cases to be returned to the state court for adjudication on the merits, the state court lacks the jurisdiction to either allow or estimate the claims either for purposes of a bankruptcy plan or for distribution purposes.[18]

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to the full exposure of the letter of credit. However, if the claims are ultimately resolved in a fashion that does not call for the letter of credit to be presented and the letter is ultimately cancelled or expires by its terms, then the encumbrance on estate assets will be released, to the benefit of the estate and its other creditors.

[18] Here is how the estimation process works and what its role is in the overall reorganization of the debtor's estate. A contingent or unliquidated claim (such as this tort action) is nonetheless a claim which can be discharged in the bankruptcy, regardless whether it has been reduced to judgment before confirmation of the plan. *See* 11 U.S.C. §§ 101(4) (definition of a

An action for claims allowance or estimation lies at the very core of the administration of the bankruptcy case. It is an essential prerequisite to the most central features of bankruptcy, the classification of claims, the determination of whether a given class has accepted or rejected a plan, and the pro rata distribution of assets in satisfaction of those claims. Said the Supreme Court in *Katchen v. Landy*,

> the expressly granted power to "allow," "disallow" and "reconsider" claims which is of "basic importance in the administration of a bankruptcy estate" is to be exercised in summary proceedings and not by slower and more expensive processes of plenary suit . . . The Trustee is enjoined to examine all claims and to present his objections . . . and "when . . . objections are made, [the court] is *duty bound* to pass on them." . . . "The whole process of proof, allowance, and distribution is shortly speaking,

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claim), 1141(d)(1) (all claims, allowed or otherwise, are discharged and bound by the confirmation of a plan); *In re American Properties, Inc.*, 30 Bankr. 239, 246 (Bankr. D. Kan. 1983); *In re White Farm Equipment Co.*, 38 Bankr. 718, 724 (D. Ohio 1984). Only allowed claims are counted for purposes of voting on a plan of reorganization. 11 U.S.C. §§ 1126(a), 1129(a)(8). Section 502(c) then provides that

> (c) There shall be estimated for purposes of allowance under this section –
>
> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . .

11 U.S.C. § 502(c). In the usual case, a plan of reorganization is likely to be presented and considered long before the average pending tort litigation gets to trial, regardless of the forum.

> an adjudication of interest claimed in *res*, . . . " and thus falls within the principle quoted above that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession. . . . "objections shall be heard and determined in a summary way".

Katchen v. Landy, 382 U.S. 323, 328-30 (1966); *see also In re Manville Forest Products Corp.*, 896 F.2d 1384 (2d Cir. 1990); *In re Chateaugay Corp.*, 111 Bankr. 67, 72 (Bankr. S.D.N.Y. 1990); *In re Comstock Financial Services, Inc.*, 111 Bankr. 849, 855 (Bankr. C.D.Cal. 1990), *citing Pepper v. Litton*, 308 U.S. 295, 304 (1939); ("[t]hat bankruptcy courts have exclusive jurisdiction over the liquidation and allowance of bankruptcy claims is a principle long recognized and not reasonably disputed").[19]

The fact that a particular claim happens to arise out of a personal injury action does not alter this basic structure of claims allowance and estimation. *In re Chateaugay Corp.*, 111 Bankr. 67, 75-76 (Bankr. S.D.N.Y. March 7, 1990). Section 157(b)(2)(B) parses the allowance or estimation of claims to the district court for distribution purposes, but to the bankruptcy court for all other purposes, including the allowance and estimation of the claim. *Id.*; 28 U.S.C. § 157(b)(2)(B). Subsection (b)(5) of that statute

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[19] Lest there be any confusion, a removed case such as this, in which the debtor is the defendant, is precisely the *opposite* of *Marathon* (where the debtor, as *plaintiff* tried to hale a third party into bankruptcy court). There is no question about the jurisdiction of this court over this case, because it involves, at bottom, nothing more than a determination of the amount of the claim the plaintiffs will be entitled to assert against property of the estate.

directs that the trial of the liquidation or estimation of personal injury claims be conducted before an Article III tribunal, but only *for distribution purposes*. 28 U.S.C. § 157(b)(5); *In re Chateaugay Corp.*, 111 Bankr. at 72.

There is a clear distinction drawn in the statute between the *liquidation* of a claim and its *allowance*. Liquidation of a claim is but one step in the larger process of allowance. *In re Comstock Financial Services, Inc.*, 111 Bankr. at 856; *In re Chateaugay Corp.*, 111 Bankr. at 75-77. Once this step is completed, the balance of the allowance process is entrusted to the bankruptcy court, which determines under Section 502 whether the claim should be allowed against estate assets, under Section 510 whether the claim should be subordinated, under Section 506 the extent to which the claim should be allowed as a secured claim, under Section 507 the extent (if any) that the claim should be accorded priority status, and so forth. All of these "allowance" questions are directly related to the extent to which a claim will be permitted to share in the estate's assets, either under a confirmed plan or under a scheme of liquidation.[20]

Of particular significance is that allowance or estimation of claims *for plan purposes* – even personal injury and wrongful death claims – is part of the core responsibility

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[20] The 1984 amendments entrusted the *trial* of personal injury tort and wrong death actions to an Article III tribunal. 28 U.S.C. § 157(b)(5); *In re Poole Funeral Chapel, Inc.*, 63 Bankr. 527, 532 (Bankr. N.D.Ala. 1986). If the claim is not allowable as a matter of law, however, then even for distribution purposes no trial would be necessary and the bankruptcy court could summarily dispose of the allowance question under Section 157(b)(2)(B). *In re Chateaugay Corp.*, 111 Bankr. at 76-77.

of the bankruptcy court. "The estimation of such claims by a bankruptcy court for other purposes, such as determining the feasibility of a debtor's plan of reorganization, is permissible and constitutes a "core" proceeding." *In re Chateaugay Corp.*, 111 Bankr. at 72. The statute assigning responsibility of bankruptcy matters to the bankruptcy courts provides, *inter alia*, that

> (2) core proceedings include, but are not limited to –
>
> > (B) allowance or disallowance of claims against the estate . . . and estimation of claims or interests *for purposes of confirming a plan* under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate *for purposes of distribution* in a case under title 11.

28 U.S.C. § 157(b)(2)(B) (emphasis added). Congress intended that the bankruptcy court (or the district court, if the reference is withdrawn) estimate *for plan purposes* claims such as the one presented by this lawsuit. Noted the district court for the Southern District of New York,

> Even assuming that Section 157(b)(5) requires that all personal injury and wrongful death claims be tried in the district courts . . . Section 157 (b) (2) (B) does not exclude from the definition of core proceedings estimations of personal injury and wrongful death claims for all purposes. The section is limited to estimation "for purposes of distribution." This leaves estimation for other purposes within the jurisdiction of the bankruptcy court.

In re Johns-Manville Corp., 45 Bankr. 823, 826 (S.D.N.Y. 1984). The actual liquidation of claims for distribution purposes often follows plan confirmation and can be deferred until that time.

In this case, the likelihood is high that a plan will be proposed, voted on, considered, and ruled on well before this tort litigation is concluded, regardless of the forum. The estate is currently operating under a six-month budget funded by Sanwa Business Credit, designed to have the debtor up to full operational capacity by October 1990. At the same time, the Chapter 11 Trustee is actively pursuing potential purchasers for the company. The upshot of these two factors is that a plan of reorganization is highly likely before the end of the year, well before these cases are ready for a trial on the merits (for distribution purposes).

It is equally clear, therefore, that either this court or the district court is going to have to consider this claim in some detail *anyway* just to estimate it for plan purposes under Section 502(c).[21] Claims estimation must precede confirmation and should preferably occur before the disclosure statement is filed.[22] *See In re Aquaslide 'N' Dive*

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[21] Section 502(c) is a *mandatory* provision. Contingent and unliquidated claims must be estimated by the court for purposes of a plan, even if noone requests it, in order to go forward with the plan confirmation process itself. *In re Continental Airlines Corp.*, 64 Bankr. 865, 868 (Bankr. S.D. Tex. 1986); *In re Curtis*, 40 Bankr. 795, 801 n. 7 (Bankr. D.Utah 1984); *In re Nova Real Estate Investment Trust*, 23 Bankr. 62, 65 (Bankr. E.D.Va. 1982).

[22] The Chapter 11 Trustee will need to know how much the claims are in order to develop an appropriate responsive plan. Creditors will be entitled to know the estate's exposure to eval-

Corp., 85 Bankr. 545, 549 (9th Cir. B.A.P. 1987); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 650-51 (2d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 176 (1988) ("a bankruptcy court *must* estimate 'any contingent or unliquidated claim, the fixing of which would unduly delay the administration of the case' ") (emphasis added).

It makes little or no sense that the estimation process for plan purposes and the adjudication process for distribution purposes proceed before different courts. Hearing both the estimation and the final adjudication of these claims in the federal district court reduces the prospect of "duplicative and uneconomic effort of judicial resources in two forums." *Browning v. Navarro, supra*. It also further reduces the prospect of an inconsistent result *vis-a-vis* the estimation of the claim (which determines the relative strength of a claim for voting on the plan of reorganization) and the ultimate adjudication of the claim (which determines the actual amount of claim to be allowed against the estate's assets).

Litigation costs are also reduced significantly by uniting these dual responsibilities in a single forum. The court which ultimately presides over the liquidation of the claims will have considered the claims in a summary fashion in the claims estimation process, leading in all

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uate whether the plan eventually proposed is one that will work, that is fair to them, and is worthy of their support. Even prospective purchasers will want to know the estate's exposure before "buying into" the debtor.

likelihood to a more efficient trial on the merits and an economic use of judicial resources.[23]

Motions for remand typically call for a balancing of competing equities, and there are, of course, some factors which favor remand. These factors do not, on balance, outweigh the reasons for denying the motion to remand, however. For example, plaintiffs point out that the current caseload of the federal district courts in this district are such that the cases will not be reached for a number of years. The cases are likely to take a number of years in state court as well, however, given the kind of discovery that the parties will have to pursue (including substantial discovery in Germany).[24] What is more, the cases might be resolved solely on consideration of the defendants' motion for dismissal based on *forum non conveniens*. *See Piper Aircraft Co. v. Reyno*, 102 S.Ct. at 266. The claims estimation process will have to be heard by the federal court in any event, so the net time savings to the district court achieved by remanding trial to the state court is

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[23] Plaintiffs argue in their post-submission brief that "the only possible reason for retaining the case in federal court is to protect the estate. Statistically, Defendant's estate has only a one-in-ten chance of successfully confirming a reorganization plan." Plaintiffs' Supplemental Brief, p. 5-6. The argument is a red herring, as the success rate of reorganization cases has no legal, factual, or equitable bearing on the locus of claims litigation. The quoted statistic is misleading anyway. The success rate for *large* reorganization cases is considerably higher.

[24] The defendant will no doubt need to depose each of the plaintiffs and their families, all of whom are located in Germany. Discovery will also be needed of the German airline and its flight crew, German officials who investigated the accident, and German air traffic controllers.

illusory. The claims estimation, coupled with the plan eventually submitted, may ultimately render any actual trial unnecessary.

Plaintiffs also argued that, but for bankruptcy, these cases could not have been removed because the defendant is a resident of Texas. 28 U.S.C. § 1445(b). The lack of independent jurisdiction is, according to plaintiffs, yet another equitable reason for remanding the cases. Plaintiffs however fail to distinguish the pre-bankruptcy debtor (Fairchild) from the post-bankruptcy estate, presided over by a chapter 11 trustee. Bankruptcy itself created the legally sufficient grounds for removal under Section 1452(a), a statute that does not contain the limitations which Section 1445 places on ordinary removal, evincing a Congressional intent that removal be more generally available (and more generously indulged) in bankruptcy cases.

Finally, the plaintiffs point out that state law issues predominate. In fact, the cases are more likely to be dominated by issues of comity and choice of law involving the laws of Germany, questions of international law involving necessary parties, subject matter and *in personam* jurisdiction, arising out of the inevitable attempt to join the airline and pilot as third party defendants, and attempts at enforcing discovery orders in a foreign jurisdiction. Neither comity nor state law questions control the disposition of these motions.[25] *See Browning v. Navarro, supra.*

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[25] Plaintiffs also attempt to urge what they contend are the facts of the case as a basis for abstention or remand. These facts are at this point presumably contested. The motion at hand is not a motion for summary judgment.

As a footnote, it should be noted that the jury trial issue which so often attends such motions is not an issue here. Because Section 157(b)(5) requires the district court to adjudicate the merits of cases such as these anyway (assuming the motions to remand are denied as recommended here), the usual concerns about *de novo* review of jury findings made in related proceedings does not come up. *See* 28 U.S.C. § 157(c)(2). Furthermore, the plaintiffs will not be entitled to a jury trial on the allowance or estimation of their claims for plan purposes. *Katchen v. Landy*, 382 U.S. 323, 330 (1966); *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782 (1989); *In re Chateaugay Corp.*, 111 Bankr. at 78.

RECOMMENDATION

For all of the foregoing reasons, this court recommends that the district court enter an order denying the motions to abstain or to remand, that it withdraw the reference with regard to these claims for purposes of estimating the claims under Section 502(c), pursuant to 28 U.S.C. § 157(d), and that it docket these adversary proceedings on its civil docket for trial on the merits for distribution purposes, pursuant to 28 U.S.C. § 157(b)(5).[26]

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[26] The recommendation to withdraw the reference as to these claims for estimation purposes grows out of this court's belief that resolution of all of these related issues in a single forum is the result most consistent with this report's findings and legal analysis. This court acknowledges that the estimation of these claims for plan purposes could, under the statute, be accomplished by the bankruptcy court as well. 28 U.S.C. § 157(b)(2)(B); *In re Chateaugay Corp.*, 111 Bankr. at 75-76.

SIGNED this 18th day of June, 1990.

Leif M. Clark
LEIF M. CLARK
U.S. Bankruptcy Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:

FAIRCHILD AIRCRAFT CORPORATION	§	BANKRUPTCY CASE
DEBTOR	§	NO. 90-50257 C
GERTRUDE BAUMGART, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HANS-JOACHIM BAUMGART AND HANNS-SEBASTIAN BAUMGART AND BABETTE BAUMGART	§	
PLAINTIFFS	§	
V.	§	SA 90 CA 818
	§	ADVERSARY NO
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN,	§	90-5131 C
DEFENDANTS	§	

MAGRET KOELLER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAINER KOELLER, PLAINTIFFS	§	
V.	§	SA 90 CA 819 ADVERSARY NO. 90-5132 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

REGINE GRIGOLEIT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF UDO GRIGOLEIT AND AS THE MOTHER AND NATURAL GUARDIAN OF BIANCA GRIGOLEIT, A MINOR,	§	SA 90 CA 820 ADVERSARY NO. 90-5133 C
V.	§	
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

CHRISTIANE HENNIG, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WERNER HENNIG AND AS THE MOTHER AND NATURAL GUARDIAN OF THOMAS HENNIG AND THORSTEN HENNIG, MINORS PLAINTIFFS	§	
V.	§	SA 90 CA 821 ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5134 C

JUGE FISS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KARL-HEINZ FISS, AND AS MOTHER AND NATURAL GUARDIAN OF CHRISTOPHER-DAVID FISS AND ANN-CATHRIN FISS, MINORS, PLAINTIFFS	§	SA 90 CA 822
V.	§	ADVERSARY NO. 90-5135 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

BRIGITTE NABER,	§	
INDIVIDUALLY, AND AS	§	
PERSONAL REPRESENTATIVE	§	
OF THE ESTATE OF	§	
DR. GERD NABER, AND AS	§	
MOTHER AND GUARDIAN	§	
OF TYLL NABER, A MINOR,	§	
PLAINTIFFS	§	SA 90 CA 823
	§	ADVERSARY NO.
V.	§	90-5136 C
FAIRCHILD AIRCRAFT	§	
CORPORATION D/B/A	§	
FAIRCHILD, AND	§	
SWEARINGEN AVIATION	§	
CORPORATION,	§	
D/B/A SWEARINGEN,	§	
DEFENDANTS	§	

MARIE-LUISE FRICKE,	§	
INDIVIDUALLY, AND AS	§	
PERSONAL REPRESENTATIVE	§	
OF THE ESTATE OF MARTIN	§	
FRICKE, AND AS THE	§	
MOTHER AND NATURAL	§	
GUARDIAN OF DIRK	§	
FRICKE, A MINOR.	§	
PLAINTIFFS	§	SA 90 CA 824
	§	ADVERSARY NO.
V.	§	90-5137 C
FAIRCHILD AIRCRAFT	§	
CORPORATION D/B/A	§	
FAIRCHILD, AND	§	
SWEARINGEN AVIATION	§	
CORPORATION,	§	
D/B/A SWEARINGEN,	§	
DEFENDANTS	§	

ERIKA HAFERKORN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN AND SILKE HAFERKORN AND ARNE HAFERKORN, PLAINTIFFS	§	
V.	§	SA 90 CA 825 ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5138 C

MARIE-LUISE REMMERS, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DIETER REMMERS, AND UTE REMMERS, JONS REMMERS, ELKE REMMERS, AND DIRK REMMERS, PLAINTIFFS	§	SA 90 CA 826
V.	§	ADVERSARY NO. 90-5139 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

DOROTHIE SCHMIDT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOTHAR SCHMIDT, AND AS THE MOTHER AND NATURAL GUARDIAN OF STEPHAN SCHMIDT, THOMAS SCHMIDT, AND JUDITH SCHMIDT, MINORS, PLAINTIFFS	§	SA 90 CA 827
V.	§	ADVERSARY NO. 90-5140 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

URSALA SCHUBERT, INDIVIDUALLY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANURCAS SCHUBERT, AND AS THE MOTHER AND NATURAL GUARDIAN OF TANJA SCHUBERT, A MINOR PLAINTIFFS	§	SA 90 CA 828
V.	§	ADVERSARY NO. 90-5141 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

HELGA TENNHARD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KLAUS TENNHARD, PLAINTIFFS	§	
V.	§	SA 90 CA 829
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	ADVERSARY NO. 90-5142 C

ROGER SCHOLZ AND FRITZ-BROWN SCHOLZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HERBERT SCHOLZ, PLAINTIFFS	§	
V.	§	SA 90 CA 830
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	ADVERSARY NO. 90-5143 C

KARIN SOTONYI, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TAMAS SOTONYI, PLAINTIFFS	§	
V.	§	SA 90 CA 831
	§	ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5144 C

GISELA SELLMAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HEINREICH SELLMAN, PLAINTIFF	§	
V.	§	SA 90 CA 832
	§	ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5145 C

KATE WINTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMANN WINTER, AND BIRGIT WINTER AND TORSTEN WINTER, PLAINTIFF	§	
V.	§	SA 90 CA 833
	§	ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5146 C

PETER HELLMER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JURGEN HELLMER, AND JRMA HELLMER, PLAINTIFFS	§	
V.	§	SA 90 CA 834
	§	ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5147 C

JANICE MARIE MORRIS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD ANTHONY MORRIS AND RICHARD PAUL MORRIS AND ANDREA LORRAINE MORRIS,	§	
PLAINTIFFS	§	SA 90 CA 835
V.	§	ADVERSARY NO. 90-5148 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN,	§	
DEFENDANTS	§	

ELSBETH ROSKE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOACHIM ROSKE DECEASED, AND AXEL ROSKE AND DETLEV ROSKE,	§	
PLAINTIFFS	§	SA 90 CA 836
V.	§	ADVERSARY NO. 90-5149 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN,	§	
DEFENDANTS	§	

ORDER ADOPTING BANKRUPTCY COURT'S RECOMMENDATION AND ORDER WITHDRAWING REFERENCE TO BANKRUPTCY COURT

On this date came on to be considered the United States Bankruptcy Court's Report and Recommendation filed June 18, 1990, and Plaintiff's Objections thereto filed July 2, 1990, The Court has conducted a *de novo* review of those matters objected to by Petitioner as required by 11 U.S.C. § 9033 (d) and has determined that the Bankruptcy Court's recommendation that the Plaintiff's Motion to Abstain or Remand be denied is proper. The Court shall therefore accept the Bankruptcy Court's recommendation to deny the Plaintiff's Motion to Abstain or Remand. The Court will also grant the Defendant's Motion to Withdraw the Reference.

Plaintiff's Motion to Abstain or Remand

In deciding whether to abstain or remand this state court action previously removed to the Bankruptcy Court, this Court must weigh such considerations as: forum non conveniens; judicial economy; comity and respect for state court's decision-making capabilities; effect of remand upon administration of bankruptcy estate; effect of bifurcating claims and parties and the possibility of inconsistent results; predominance of state law issues and nondebtor parties; and prejudice to parties to the action. 28 U.S.C. §§ 1334 (c)(1) and 1452 (b); *Western Helicopters, Inc., v. Hiller Aviation, Inc.*, 97 B.R. 1, 3 (1988); *Browning v. Navarro*, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984). The Court has considered these issues as addressed in the Bankruptcy Court's Report and Recommendation and Petitioner's objections thereto. The Court

has reviewed all documents submitted to the Bankruptcy Court regarding these motions.

Each of Plaintiffs objections to the Report and Recommendation merely reurge the same arguments that were already before the Bankruptcy Court. The Report and Recommendation adequately addressed each issue objected to by Plaintiffs. This Court has made a de novo review of all matters regarding these motions and finds no error in the Bankruptcy Courts' recommendation to deny the Motion to Abstain or Remand.

Defendant's Motion for Order on Withdrawal of the Reference

In accordance with 28 U.S.C. § 157(b)(5) this Court shall order that the wrongful death claims shall be tried in the district court for the district in which the bankruptcy case is pending and pursuant to 28 U.S.C. § 157(d) this Court shall withdraw reference of these adversary proceedings from the bankruptcy court.

Consolidation

Furthermore, pursuant to Fed. R. Civ. P. 42, this Court shall order that all the above referenced actions be consolidated upon transfer to this Court.

The Bankruptcy Court's Report and Recommendation are ADOPTED.

Plaintiff's Motion to Abstain or Remand is DENIED.

Defendant's Motion for Order on Withdrawal of Reference is GRANTED.

The nineteen above referenced actions shall be CONSOLIDATED upon transfer to this Court.

IT IS SO ORDERED.

Signed this 30 day of July, 1990.

Emilio M. Garza
EMILIO M. GARZA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GERTRUDE BAUMGART, ET AL.,	§	
Plaintiffs	§	CIVIL ACTION
	§	NO. SA-90-
V.	§	CA-818
FAIRCHILD AIRCRAFT CORPORATION and SWEARINGEN AVIATION CORP.,	§	
Defendants	§	

JUDGMENT

In accordance with the Court's Order of Dismissal, it is hereby ORDERED, ADJUDGED AND DECREED that this case is DISMISSED and that the parties should bear their own attorney's fees and costs.

IT IS SO ORDERED.

SIGNED this 30th day of Sept, 1991.

Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GERTRUDE BAUMGART, ET AL.,	§	
Plaintiffs	§	CIVIL ACTION
	§	NO. SA-90-
V.	§	CA-818
FAIRCHILD AIRCRAFT CORPORATION and SWEARINGEN AVIATION CORP.,	§	
Defendants	§	

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, GERTRUDE BAUMGART, individually, and as personal representative of the estate of Hans-Joachim Baumgart, and HANNS-SEBASTIAN BAUMGART and BABETTE BAUMGART; CHRISTIANE HENNIG, individually, and as personal representative of the estate of Werner Hennig, and as the mother and natural guardian of THOMAS HENNIG and THORSTEN HENNIG, minors; URSULA SCHUBERT, individually, and as personal representative of the estate of Anurcas Schubert, and as the natural guardian of TANJA SCHUBERT, a minor; HELGA TENNHARD, individually, and as personal representative of the Estate of Klaus Tennhard; GISELA SELLMANN, individually, and as personal representative of the estate of Heinreich Sellmann; KARIN SOTONYI, individually, and as personal representative of the estate of Tamas Sotonyi; MARIE-

LUISE FRICKE, individually, and as personal representative of the estate of Martin Fricke, and as the mother and natural guardian of DIRK FRICKE, a minor; REGINE GRIGOLEIT, individually, and as personal representative of the estate of Udo Grigoleit, and as the mother and natural guardian of BIANCA GRIGOLEIT, a minor; ELSBETH ROSKE, individually, and as personal representative of the estate of Joachim Roske, deceased, and AXEL ROSKE and DETLEV ROSKE; ERIKA HAFERKORN, individually, and as personal representative of the estate of Herman Haferkorn, and SILKE HAFERKORN and ARNE HAFERKORN; ROGER SCHOLZ and FRITZ-BROWN SCHOLZ, individually, and as personal representative of the estate of Herbert Scholz; KATE WINTER, individually, and as personal representative of the estate of Hermann Winter, and BIRGIT WINTER and TORSTEN WINTER; JANICE MARIE MORRIS, individually, and as personal representative of the estate of Harold Anthony Morris, and RICHARD PAUL MORRIS and ANDREA LORRAINE MORRIS; MARIE-LUISE REMMERS, individually, and as personal representative of the estate of Dieter Remmers, and UTE REMMERS, JONS REMMERS, ELKE REMMERS and DIRK REMMERS; BRIGITTE NABER, individually, as personal representative of the estate of Dr. Gerd Naber, and as the mother and natural guardian of TYLL NABER, a minor; DOROTHIE SCHMIDT, individually, and as personal representative of the estate of Lothar Schmidt, and as the mother and natural guardian of STEPHAN SCHMIDT, THOMAS SCHMIDT and JUDITH SCHMIDT, minors; JUGE FISS, individually, and as personal representative of the estate

of Karl-Heinz Fiss, and as the mother and natural guardian of CHRISTOPHER-DAVID FISS and ANN-CATHRIN FISS, minors; PETER HELLMER, individually, ad [sic] as personal representative of the estate of Jurgen Hellmer, and JRMA HELLMER; and MAGRET KOELLER, individually, and as personal representative of the estate of Rainer Koeller, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the Order Granting Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens* entered in this action on September 30, 1991.

Dated: New York, New York
October 14, 1991

Respectfully submitted,

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Tom Davis
TOM DAVIS

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

Signature below certifies that a true and correct copy of the foregoing was sent on the 14th day of Oct, 1991, by certified mail, return receipt requested, on the following:

Tom Davis

Robert F. Ruckman
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